No. 15,102

IN THE

United States Court of Appeals

For the Ninth Circuit

THE CANADA LIFE ASSURANCE COMPANY, a corporation,

Appellant,

vs.

CHARLOTTE S. HOUSTON,

Appellee.

APPELLEE'S BRIEF.

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STATEMENT OF THE CASE.

Appellee (plaintiff below) filed her action to recover as beneficiary of an insurance policy on the life of her deceased husband, William M. Houston. The policy had been applied for on September 24, 1953 and was issued by appellant (defendant) company November 3, 1953. Mr. Houston died February 22, 1954 as a result of a gunshot wound suffered by him in the basement of his Berkeley, California home.

The insurance company defended on two grounds: First that the insured had misrepresented his drinking habits, and second that his death was the result of suicide, which under the terms of the policy was

an excluded risk if occurring within the first two years of the policy. At the trial it was stipulated that no question was raised concerning the adequacy or sufficiency of the proof of death which was received by the company May 4, 1954, and that the sole issues for determination were the affirmative defenses of misrepresentation and suicide (R. 73).

From the uncontroverted evidence it appears that at the time of his death, Mr. Houston was the United States manager for three foreign insurance companies (R. 156). He and his wife, to whom he had been married approximately 26 years (R. 337), resided in Berkeley, California. The older of their two daughters was married and the younger still lived at home. The Houstons' marriage had been very congenial and the Houstons enjoyed a close-knit, happy family life (R. 338).

On the Friday before Mr. Houston met his death he put in a full day at his office in San Francisco (R. 541) making plans for activities for the coming week. Part of the work he had planned for that day he deferred, stating to his secretary that he could do it the following Tuesday (R. 542 and 543). His secretary did not notice that Mr. Houston's manner or actions that day were any different than usual (R. 542). On the Saturday preceding his death he attended a party at his daughter's college sorority house at which he mingled with his friends and others there, appeared to enjoy himself and acted as was normal and usual (R. 340-341). On the following day, Sunday, he went to Church as usual with his

family, and spent the afternoon with two associates, Mr. Taylor and Mr. Wilkes, discussing the affairs of the southern Oregon ranch venture in which they were jointly interested (R. 599). Mr. Houston seemed his usual self all during this meeting (R. 575 and R. 599). That evening Mr. and Mrs. Houston, together with their daughter Ann, attended a dinner party given by Mr. and Mrs. Hanscom. This was a family dinner party inasmuch as Ann was engaged to the Hanscom's son (R. 342). Mr. Houston was in good spirits all during the evening and acted as usual (R. 456). Mr. and Mrs. Houston left the Hanscom's home at approximately 11:00 o'clock (R. 455) and returned directly home (R. 350). On this occasion Mr. Houston had had two drinks before dinner and none afterwards (R. 455).

Monday, February 22, was a holiday. In accordance with the usual custom in the Houston house the entire family slept late on holidays and weekends (R. 429 and R. 430). Mrs. Houston and Ann had gotten up at approximately 9:30 and had been doing some housework (R. 350).

At about 1:00 or 1:30 in the afternoon, Mrs. Houston went upstairs and awakened her husband. She asked him if he would like to join them for breakfast. Mr. Houston said he would (R. 351). He appeared to Mrs. Houston to be congenial, happy and in every respect normal (R. 351). Mrs. Houston then put a glass of tomato juice on the stairway by the bathroom door because, by that time, Mr. Houston had gone into the bathroom to wash up (R. 351). He

came out of the bathroom, drank the tomato juice, and came down to the first floor. He was dressed in his bathrobe, pajamas and leather slippers. He did not have on the trifocal glasses which he usually wore (R. 357).

As Mr. Houston came into the kitchen, his daughter, Ann, was singing, "Oh, What a Beautiful Morning". He gave her a goodmorning kiss on the forehead commenting that it certainly was a beautiful morning (R. 421). His daughter told him that they were going to have steak for breakfast and he said that sounded wonderful (R. 421). His appearance, actions and manner seemed perfectly normal to Ann. Mr. Houston then proceeded immediately down the basement stairs. It was not unusual for him to go to the basement as he kept much of his sporting equipment there and frequently spent his time there repairing or cleaning it (R. 372-3). Nor was it unusual for him to do so while awaiting preparation of a meal. A few minutes later, both Mrs. Houston and her daughter heard a thud. Mrs. Houston ran down to the basement where she found Mr. Houston lying on the floor bleeding and she called her daughter to phone for an ambulance.

Police officers who arrived shortly found the following:

The shooting occurred in a narrow passageway 18 inches wide (R. 372) at the rear of the basement at a point directly beneath the living room of the Houston home (Plaintiff's Exhibit 1). The floor in this section of the basement which was used as a storage area was

raised approximately 14 inches above the main basement level (R. 110, 111). The passageway led through many stored items to a book shelf at the rear corner. Among the items stored in that area on either side of the passageway were lawn chairs, a cedar chest, a sofa, sleeping bags, a garden trellis and some bed boards, the ends of which protruded into the passageway (R. 491-2, 364, 525). The distance from the floor of this part of the basement to the floor joists of the ceiling was approximately 5′6″ to 5′11″ (R. 125). The electric lights in the basement were off and the rear corner where the shooting occurred was rather dark (R. 415).

The rifle, an 1894 Winchester, 30 caliber, lever action, repeater, was found in the middle of the narrow passageway. It had only the one spent shell in it (R. 124). There were blood spots approximately in the area where the gun was found. Mr. Houston's body, face down, was found approximately 15′ to 22′ from the gun, in the direction of the basement stairs (R. 360) with his head toward the stairs (R. 111). Ammunition in a paper bag was found on the book shelf in the far corner of the storage area. It contained two different kinds of cartridges (R. 532), one of which would fit the Winchester (R. 107). The bag of shells was found rolled tight and closed (R. 121).

The bullet had entered the body through the chest (R. 108) in the general area of the heart (R. 122) but had not actually hit the heart (R. 506), and had come out through the back around the bottom of the shoulder blades (R. 109). There was an area around

the entrance hole that was blackened from powder and the clothing remaining over the wound was blackened (R. 122) showing that the gun muzzle was removed a distance from the body (R. 533) at the time of the shot. The bullet had entered the ceiling on a slight angle (R. 498). There was an indentation made by the butt of the rifle on the floor approximately in the area where the gun was found. The bullet from the gun had gone through the ceiling and entered the back of a chair in the living room where appellee's mother and daughter had been, and lodged under the upholstery towards the back of the chair (R. 503). The bullet coursed somewhat downward as it went through Mr. Houston's body and veered to the left (R. 506). Mr. Houston was a tall man, standing in height 6′ 2″. It was therefore necessary for him to stoop in the passageway area where the shooting occurred.

It was found possible to discharge the Winchester weapon by striking it when the hammer was down on the firing pin (R. 511). The gun could also be discharged by striking it on the butt on the floor (R. 511 and R. 528). The lever action on the gun was quite loose and it tended to open very readily (R. 513 and R. 529). Upon opening it would be in a position to cock and load the gun which would occur upon the closing of the lever, perhaps without realization of the person doing it (R. 513). When the lever was opened the trigger of the gun was exposed (R. 513 and R. 514). The gun was found to have a trigger pull of between 4½ and 5 lbs. (R. 527).

All witnesses familiar with Mr. Houston's habits testified that he kept guns all over his home and that he habitually kept guns loaded (R. 409); also that he kept shells all over his home. For example there was a pistol in his bedroom closet (R. 426) and shells in the bureau in his bedroom (R. 409). Mr. Houston frequently stored guns in the basement on the raised platform area (R. 486). Some guns were observed there a few weeks before his death (R. 587, 593).

Mr. Houston had not had any serious illness or sickness within a year prior to his death, or at any time (R. 377 and R. 378). He had an excellent financial standing with a net worth of approximately $100,000.00 (R. 381). He was successful in his business and had been offered the presidency of another insurance company shortly prior to his death (R. 551). He was a vigorous and dynamic man, who loved life and was very active in hunting, fishing and in other sports (R. 381-382). No suicide or other notes were found. There was no evidence of any statements to members of his family or others indicating suicidal intent (R. 391). All witnesses called for the plaintiff and Mr. Masters, insured's assistant manager, called by the defendant, testified that Mr. Houston had never exhibited any tendencies of depression or melancholia, or at any time had ever talked about or indicated that he might take his own life. On the contrary, they all testified that he was the type of man that loved life and enjoyed living thoroughly.*

*For the convenience of the Court, the portions of the transcript of testimony of each of these witnesses with respect to insured's

In his application for insurance Mr. Houston had answered the printed questions concerning his drinking habits, as follows:

	Question	Answer
6-a	To what extent do you use alcoholic stimulants?	Yes, socially only occasionally.
6-b	Have you ever used them to excess?	No.

Appellant's evidence in support of its defense of fraudulent misrepresentation in this respect consisted of the testimony of a waitress in a Lakeview, Oregon cafe who stated that on two or three occasions in October, 1953, she had observed Mr. Houston in the cafe and that he apparently had had a considerable amount to drink and was intoxicated (R. 213-14)[1] and of the testimony of Virginia Wilkerson, daughter of a close friend of Mr. Houston. She testified that she couldn't say how much Mr. Houston had to drink as a general rule when he was in Lakeview without his wife (R. 254) and that he had been under the in-

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disposition and lack of tendencies of depression or melancholia is set forth in Appendix A.

[1]This testimony was admitted over appellee's objection that evidence of actions in October, 1953, after the date of the application are not admissible on the issue of misrepresentation in the application. As bearing on the credibility of this witness, it should be noted that she also testified that she saw Mr. Houston wearing a coonskin cap (R. 211) and yet appellant's other witness, Virginia Wilkerson, who had seen Mr. Houston whenever he came to Lakeview over a period of ten years (R. 250) testified that she had never seen him wear a coonskin cap (R. 323-4). Other witnesses who saw him frequently in Lakeview stated he had never worn such headpiece (R. 471 and R. 565).

fluence of alcohol a great deal of the time (R. 257)[2] This same witness further testified that her knowledge of his drinking habits was confined to his visits to Lakeview which occurred not more than four or five times a year (R. 260-261); that her testimony to the effect that on occasions he might have more than four highballs referred to periods of possibly six hours after a day of hunting (R. 269) and that the occasions on which she saw him drinking were social occasions (R. 318-319). The assistant manager to Mr. Houston, Mr. Masters, called as a witness by appellant testified that he lunched with Mr. Houston approximately once every two weeks, that on some occasions he would have several cocktails before lunch and that at dinners which the witness attended with Mr. Houston he would have two or three drinks prior to dinner and very seldom four (R. 169-170). Mr. Masters further stated that he had never seen the insured intoxicated or never in a condition as a result of drinking where he was unable to handle himself (R. 185). Mr. Youngers, an employee of Mr. Houston's company, called by appellant testified to the same effect (R. 154-155).

Appellee produced the insured's wife and two daughters, friends and business associates who knew him well over a period of years, including three attorneys, hunting companions, his personal secretary and a son-in-law, each of whom testified without exception that during the period each had known him

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[2]This testimony is directly contradicted by that of the witness' father, Harry A. Utley (R. 567, App. pp. xv-xvi).

they had never known the insured to be intoxicated or under the influence of alcohol without full possession of all his mental and physical faculties.[3]

The trial Court stated in its memorandum opinion that it could not conclude that "defendant insurance company has shown by a preponderance of the evidence that insured committed suicide" (R. 52) nor that "the insured's use of alcohol was proven to be excessive or unusual so that it can be said that he misrepresented the facts in answering the general questions propounded to him in the application" (R. 42). The trial Court accordingly entered findings that Mr. Houston's death was not the result of suicide but was accidental (R. 75) and that his use of alcohol was neither excessive nor unusual and that his answers in the insurance application did not constitute a material or any misrepresentation (R. 75-76).

QUESTIONS PRESENTED.

1. Has the trial Court correctly determined that appellant insurance company failed to sustain its affirmative defense that insured's death was suicidal?

2. Has the trial Court correctly determined that appellant insurance company failed to sustain its affirmative defense that insured in the application for insurance made fraudulent misrepresentations concerning his habits in the use of intoxicating liquor?

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[3]For the convenience of the Court, the portions of the transcript of testimony of each of these witnesses with respect to Mr. Houston's drinking habits is set forth in Appendix B.

3. Has the trial Court correctly determined that plaintiff is entitled to interest from the date of receipt of proof of death?

SUMMARY OF ARGUMENT.

Under applicable law and the terms of the policy in question, appellant had the burden of proof upon each of its two defenses that insured had committed suicide and that he had fraudulently misrepresented his drinking habits in the application for insurance. The trial Court having found that neither defense was established by appellant, the principal question here presented is whether there is adequate evidence to support the Court's findings. Since the questions of suicide and of fraudulent misrepresentation are both questions of fact, the further issue is presented whether on the whole record suicide or fraudulent misrepresentation is so clearly shown as to require reversal of the trial Court as a matter of law.

On the suicide issue, appellant bases its appeal upon the proposition that the so-called physical facts "present a theory of suicide" (App. Br. 34) and are inconsistent with any reasonable hypothesis of accident. In substance it is asserted that the mere fact insured was shot through the chest area while stooped in the basement of his home compels a conclusion of suicidal death. In so arguing appellant disregards entirely the presumption against suicide and the fact that such presumption is itself evidence to be considered by the trier of fact. Moreover, the inferences

which appellant draws from the established facts in order to support its suicide theory are not the only reasonably permissible inferences and it is not correct that the physical facts are wholly inconsistent with a theory of accident. The time of the shooting, its occurrence in insured's home with other members of his family present, the fact that insured struggled more than 15 feet after the shooting, and the uncontroverted fact that the gun could be fired by means other than intentionally pulling the trigger are all consistent with accident and inconsistent with suicide. In addition, all the other surrounding facts and circumstances, the family, business and financial position of insured, his temperament, character and good health, and particularly the absence of any motive or reason for intentional self-destruction all strongly support the trial Court's finding of accidental death and negative any theory of suicide, wholly apart from the presumption against suicide. Thus, not only has appellant failed to meet its burden of establishing suicide but the evidence clearly supports the trial Court's finding that the insured's death was accidental.

On the issue of fraudulent misrepresentation, appellant relies on references to one or more so-called drinking episodes in Lakeview, Oregon, as establishing that the insured was an habitual drunkard, who falsely represented to appellant in his application that he drank socially and occasionally and was not an excessive user of alcoholic stimulants. Appellant's testimony concerning insured's drinking habits in

Lakeview prior to the time of the application was contradicted by witnesses for appellee who regularly associated with insured there over a period of years. Appellee produced members of the family, social and business friends all of whom knew the insured well over periods of years and all of whom testified that he was not an excessive drinker and that they had never seen the insured under the influence of alcohol. All the evidence in the case supports the trial Court's conclusion that there was no evidence of drinking habits contrary to those indicated by insured in his application and that no misrepresentation of any sort was established.

The Court's rulings with respect to the admission and exclusion of evidence were obviously correct and in any event in no sense prejudicial to appellant or its theory of the case. The trial Court correctly allowed interest on the amount due from the date proof of loss was received by appellant. For all the foregoing reasons the judgment should be affirmed.

ARGUMENT.

I. THE TRIAL COURT'S FINDING THAT INSURED'S DEATH WAS NOT THE RESULT OF SUICIDE IS AMPLY SUPPORTED BY THE EVIDENCE.

A. The trial Court correctly defined appellant's burden to prove the affirmative defense of suicide by a preponderance of the evidence.

There can be no question under the authorities that the insurance company had the burden of establish-

ing its affirmative defense of suicide.[4] This is the general rule in California and other jurisdictions.

28 *Cal. Jur.* 2d 370, Insurance Sec. 599;

29 *Am. Jur.* 1085, Insurance Sec. 1445.

The test to be applied both upon trial and appeal is set forth in the California case[5] of *Beers v. California State Life Ins. Co.,* 87 Cal. App. 440, as follows:

> "It must be borne in mind that the defendant entered the trial charged with the burden of overthrowing the presumption that the deceased was sane and that her death was not suicidal but from a natural cause. (Code Civ. Proc., sec. 1963, subd. 28; *Jenkin v. Pacific Mutual Life Ins. Co.,* 131 Cal. 121 [63 Pac. 180]; *Dennis v. Union Mutual L. Ins. Co.,* 84 Cal. 572 [24 Pac. 120]; 21 Cor. Jur., sec. 35, p. 95.) It rested upon

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[4]The defense is founded upon a provision of the insurance policy that "During the first two years from the date of issuance of the policy suicide (whether insured be sane or insane) is a risk not assumed under this policy." This situation should be sharply distinguished from those cases where plaintiff seeks recovery under an *accident insurance policy* or under a *double indemnity* provision where the policy generally provides for an amount payable in the event the insured died by accidental and not intentional means. In these situations some of the cases indicate that the plaintiff is bound to establish as a part of its prima facie case that the death was accidental within the terms of the particular provision. That however, is not the situation presented in this case under the particular policy in question. Here, plaintiff made out a prima facie case by establishing the policy and the fact of death which is not controverted. Defendant must show that the death comes within the exception, i.e., that the death was suicide (see 28 Cal. Jur. 2d 367-370).

[5]On matters relating to burden of proof, presumptions and weight of evidence, Federal Courts, under the doctrine of *Erie R. Co. v. Tompkins,* 304 U.S. 64, follow the rule of decision of state courts of the state in which the Federal Court sits. *Occidental Life Ins. Co. v. Thomas,* 1939, 9 Cir., 107 F. (2d) 876; *Equitable Life Assur. Soc. v. MacDonald,* 1938, 9 Cir., 96 F. (2d) 437 (cert. den. 305 U.S. 624); Anno. 128 A.L.R. 405, 54 Am. Jur. 970, 982.

> the defendant to overcome said presumption, or, in other words, to support the affirmative defense of suicide 'by a preponderance of clear and satisfactory evidence, direct or circumstantial.' (37 Cor. Jur., sec. 443, p. 640, and cases cited in the footnotes and also the above-named cases.) And whether the defendant introduced sufficient satisfactory proof to overcome that presumption or to sustain that defense was a question to be solved by the jury, with whose conclusion we are not privileged, legally, to interfere, unless the evidence of suicide is upon its face obviously such as to compel us to hold that no other inference but that of intentional self-destruction may reasonably be drawn. * * *''

It is the established rule in California that the presumption against suicide is itself evidence, (*Byers v. Pacific Mutual Life Ins. Co.,* 133 Cal. App. 632, 637)[6] which will stand for the fact it represents, i.e. that death was not intentionally self-inflicted, until in the mind of the trier of fact, it is overcome by clear and satisfactory evidence.

Beers v. California State Life Ins. Co., supra.

Where circumstantial evidence is relied upon to show suicide, the circumstances must exclude with reasonable certainty any hypothesis of death by accident. Thus, in *Prudential Insurance Co. of America v. Baciocco* (1929, 9 Cir.) 29 F. (2d) 966, the Court said:

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[6]And see *Smellie v. Southern Pacific Co.,* 212 Cal. 540; *Speck v. Sarver,* 20 Cal. (2d) 585; *Everett v. Standard Accident Ins. Co.,* 45 Cal. App. 332, 339.

"It is not controverted that death by drowning is a death by external and violent means within the terms of the policy, nor is it questioned that in cases of this character where such a death is shown there is a presumption against the theory of suicide. *Metropolitan Life Ins. Co. v. Broyer* (C.C.A.) 20 F. (2d) 818. It is also conceded that by reason of this presumption appellant had the burden of proving the contrary, and that where, as here, evidence of self-destruction is circumstantial, the insurance company must fail 'unless the circumstances exclude with reasonable certainty any hypothesis of death by accident, or by the act of another.' Tabor v. Mutual Life Ins. Co. (C.C.A.) 13 F. (2d) 765, 769.

"We cannot say that the court below erred in holding that the circumstances fail to measure up to this requirement. * * * From a consideration of the entire record, we are of the opinion that the manner of the insured's death is an unsolved mystery, and that we would not be warranted in disturbing the finding of the lower court.

"The judgment is therefore affirmed."

Other authorities to the effect that it is not proper to find that a death was suicidal as a matter of law unless all the facts and circumstances exclude with reasonable certainty any hypothesis of death by accident are:

Wilkinson v. Standard Accident Ins. Co., 180 Cal. 252;

Beers v. California State Life Ins. Co., 87 Cal. App. 440;

Brooks v. Metropolitan Life Insurance Co., 27 Cal. (2d) 305.

See also:

Jenkin v. Pacific Mut. Life Ins. Co., 131 Cal. 121.

The facts and circumstances involved in each of these cases are summarized below[7] by way of illustration of the application of the rule and for comparison with the facts of this case.

The trial Court in this case was aware of and referred in its opinion to the foregoing rules. It noted that the defendant had the burden of establishing the

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[7]*Prudential Ins. Co. of America v. Baciocco*, supra, was an action on a policy providing for double indemnity in case of accidental death and also providing that in case of death by suicide within a year from issuance of the policy the liability of the insurer should not exceed the amount of premiums paid. Plaintiff and deceased were partners and each had taken out policies of life insurance on the other. Deceased was twenty-nine years old, had a wife and two children. The Court found that he was an industrious, temperate man. Defendant produced evidence tending to show that for some time prior to his death deceased had maintained unduly intimate relations with a woman other than his wife and that he was in a measure responsible for the dissipation of the assets of the business in which he and his partner were engaged. After an evening spent with the woman in question he was not seen after about 2:00 A.M. until the following morning his body was found lying on the beach below the Cliff House where it had apparently been cast by the sea. The surgeon who made the autopsy was of the opinion that death was from drowning. The trial Court found that the death was accidental and as noted the Appellate Court affirmed the judgment.

Wilkinson v. Standard Accident Insurance Company, supra, was an action on a policy for accidental death. Defendant appealed from a judgment in plaintiff's favor contending there was no evidence to support a theory of accident. Insured was found dead in his bedroom by his wife who had heard the report of a revolver. The body was found in front of a wash bowl with a bullet in the forehead. There were no powder marks or burns on the face. A revolver lay near his knee about three feet from his right hand. There was a nick on the edge of the wash bowl as if some hard object had fallen and had chipped and discolored the surface, which was not there before the accident. A firearms expert testified that the revolver could have been discharged by a blow on the hammer, and that it was light on the trigger. One of

affirmative defense of suicide, citing *Beers v. California State Life Ins. Co.,* supra, (R. 43). It further pointed out that if the evidence presented spelled out but one conclusion, namely suicide, the question of burden of proof should not be permitted to obscure the real issue, but that where as here the evidence has left the Court with the definite view that the shooting may have been the result of accident, the burden of proof does have significant importance (R. 46). To

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defendant's witnesses testified to having seen the insured on the evening of the shooting and that he did not seem to have full control of himself. This testimony was contradicted by plaintiff. No motive for suicide was shown and the evidence shows without conflict, that insured was a man of happy disposition, that he was free from domestic or business troubles, and that he was cheerful and in excellent health up to the time of his death. The Appellate Court in rejecting the contention of defendant that the circumstances compelled the conclusions that the decedent committed suicide, stated that it is neither inherently incredible nor altogether impossible that he could have been accidentally shot and concluded that it was not justified in holding as a matter of law, that, under all the circumstances and the possible inferences to be drawn therefrom, the evidence adduced upon the whole case is not sufficient to support the findings of the jury implied from their verdict, that the death of the deceased was due to accident and not to suicide.

Beers v. California State Life Ins. Co., supra, was an action on an insurance policy in which a verdict was returned in favor of plaintiff. Defendant appealed upon the ground, among others, that the verdict was not supported by the evidence. The policy contained the usual clause exempting the risk of suicide occurring within a year from the date of the policy and defendant contended that the insured had committed suicide by taking and swallowing strychnine. The Appellate Court noted that the single question submitted to the jury was whether the poison was self administered with suicidal intent, and, the jury having returned a verdict negativing the suicide theory, whether the Appellate Court is required to hold as a matter of law that the jury's verdict is without sufficient support in the evidence. The evidence was entirely circumstantial. The insured resided with a sister and was attending part-time high school. About a week before her death she had purchased at a drug store a bottle containing one-half ounce strychnine sulphates which she had charged to her personal account and which she told the druggist she wanted for the purpose of destroying rats. On the evening preceding her death, she had attended the movies with friends, following which they went to a tamale parlor

suggest, as does appellant, that the trial Court misapprehended the law (Appellant's Brief 32, 34) is a gross distortion of the record and the trial Court's opinion.

Appellant argues that its "burden was merely to produce evidence which would lead reasonably to the conclusion that the deceased committed suicide, regardless of any other theories that might be posed by the evidence". (App. Br. 32). The mere statement

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for refreshments. She returned to her sister's home and upon her sister's arrival somewhat thereafter, she stated that she had had a wonderful time. A short time after they had all retired, the deceased exclaimed in a loud voice that she was very sick. The Appellate Court, after exhaustively reviewing all of the evidence, stated that insured's death involved a mystery not satisfactorily solved by the evidence. It conceded that the circumstances stressed by defendant were indicative of a designed, self-administered death, and would have supported a jury's determination of suicide, but these circumstances are not upon their face conclusive as against other circumstances which tend to sustain the assumption that her death was not intentionally self inflicted. The Court noted that the circumstances tending to support each theory were substantially equal in probative force and that therefore it was of exceptional importance that there was an entire absence of motive in the deceased having purposely or intentionally taken her life. The Appellate Court affirmed the judgment, concluding that the evidence is of a character which precludes determining as a matter of law that the defendant succeeded in overcoming the presumptions that the death of the deceased was not purposely self-inflicted.

Brooks v. Metropolitan Life Insurance Company, supra, was an action on an accident insurance policy which expressly precluded recovery in case of suicide. The jury returned a verdict in favor of defendant and the trial Court granted plaintiff a new trial on the ground of insufficiency of the evidence. The insured died in a fire which started in his bedroom. There were no eyewitnesses. Two years prior to his death he had undergone an operation for cancer, and during the months preceding his death he spent most of his time in bed and was attended by day and night nurses. On the morning of the fire he was lying in his bed when the night nurse left. A large pile of newspapers were on top of the bed within easy reach. There was a bottle of rubbing alcohol on a dresser in the corner of the room. A portable gas stove was left burning when the night nurse went off duty. It was apparently located between the bed and a nearby cot. The insured was found dead on the cot, the lower portion of his body being badly burned. There were

of appellant's proposition not only offends common sense, but it is clearly contrary to established law as disclosed by the foregoing authorities. Appellant asserts that proof of a motive for suicide was not essential to its case[8] and seems to imply that the trial Court

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burned newspapers on the cot and ashes of burned newspapers on the floor. A portion of the bed was also burned. The Appellate Court observed that there was conflict in the testimony as to the physical factors and that conflicting inferences could be deduced from the facts proved. The Court concluded it could not say, as a matter of law, that the evidence compelled a conclusion that the death was suicidal. The order granting a new trial was accordingly affirmed.

Jenkin v. Pacific Mut. Life Ins. Co., supra, was an action on an accident insurance policy which required claimant to establish affirmatively that death resulted from accident. On trial before the Court, without a jury, judgment was for defendant and plaintiff appealed contending that the evidence was insufficient to support the trial Court's finding that the insured did not die of accidental injury. The evidence without conflict showed that the insured died of a gunshot wound received two days before his death; that a bullet entered the body in the front between the sixth and seventh ribs. No one was present at the time he received the injury. His statements to the physician as to how he was wounded were stricken out on motion of defendant. The Appellate Court noted that the only evidence from which to determine whether the wound was inflicted accidentally or purposely is the nature and character of the wound itself. The Court noted that the burden was on plaintiff by the terms of the contract to show that the wound was inflicted accidentally, but that it was not necessary that he should produce direct testimony of eyewitnesses. The Court also noted that it is contrary to the general conduct of sane men to take their own lives and that all the presumptions are in favor of sanity and against crime, that it will not be presumed that the insured purposely took his own life nor that he was murdered and that death must be attributed to accidental causes. It was held that the finding complained of is contrary to the evidence and the judgment was reversed.

[8]The fragmentary quotation from *Beers v. California State Life Ins. Co.*, supra (App. Br. 33), is misleading. The entire sentence from which it is extracted is set forth in the trial Court's opinion (R. 51-52) as follows: "As is true in its application to the proof of the commission of crime, particularly in the proof of the crime of murder, the rule is that, while the proof of motive is not indispensable, yet the presence or absence of motive is a circumstance going to the question of the quality of the act under inquiry."

found against the defense of suicide solely because no motive was established. Such suggestion is completely unwarranted. A fair reading of the trial Court's opinion discloses that it considered the absence of motive as only one of numerous factors correctly bearing on the quality of the act under inquiry.

It is apparent, therefore, that in order to establish the affirmative defense of suicide it was necessary for appellant to overcome the presumption against suicide by a preponderance of clear and satisfactory evidence, and, where, as here, the evidence is circumstantial, the circumstances must exclude with reasonable certainty any hypothesis of death by accident. This is obviously the rule adopted by the trial Court. A mere theory of suicide is not enough. Moreover, upon appellate review, the trial Court's determination against suicide is overcome and suicide as a matter of law can be said to exist only when the evidence is such that no other inference but that of intentional self-destruction may reasonably be drawn.

B. The evidence relied upon to establish suicide is insufficient to accomplish that purpose.

Appellant asserts and reasserts throughout its brief that the physical facts are consistent only with suicide and inconsistent with accident. Its suicide theory is predicated upon the facts that the wound was sustained in the chest while insured was bent over horizontal to the floor with his chest close to the muzzle of the upright gun and with only one cartridge in the gun. From this appellant argues that a finding of suicide must irresistibly follow.

It should be noted at the outset that in order to reach a conclusion of suicide from these facts it is necessary for appellant to indulge in a series of inferences. Appellant must infer for example that Mr. Houston knew that this particular gun was loaded and that the cartridge was in position to be fired or that he deliberately loaded and cocked the gun. Appellant must infer that insured deliberately placed the gun on the floor, muzzle up, and in a confined area assumed an unnatural, awkward and cramped position. And appellant must infer that insured deliberately placed his finger upon the trigger and pulled it, intending thereby to cause his own self-destruction. Without these inferences appellant cannot reach its conclusion of suicide. The mere physical facts themselves present no theory whatsoever.

It may fairly be asked whether these inferences are reasonable under all the circumstances and whether they are the only reasonably permissible inferences. Obviously the trial Court thought otherwise for it stated in its opinion: "The position of the gun and body appears equally consistent with the theory of accident to this Court." (R. 49). And: "The physical facts do not spell out a clear case of suicide. There is room for speculation as to how the shooting actually took place". (R. 52). The fact is that appellant's suicide theory does not withstand analysis.

The trial Court however carefully considered and rejected other factors which had been urged as supporting appellant's suicide theory. In response to the suggestion that insured's wife had originally told the

police officer that her husband had periods of depression, the trial Court correctly recalled the record that in the same breath she had told the officers that her husband had been in fine spirits during the week-end (R. 50, R. 114, R. 408). The time and place of the shooting do not compel a conclusion of suicide, nor the fact that Mr. Houston wasn't then planning any hunting trips and that he was usually careful with guns (R. 50).

As the trial Court notes, the foregoing so-called physical facts are all that supports a suicide theory. The facts themselves are not clear-cut and do not constitute a preponderance of clear and satisfactory evidence of suicide. Nor can it be said that the inferences reasonably to be drawn from such facts are consistent only with a theory of intentional self-destruction and wholly inconsistent with the conclusion of accidental death.

With the exception of the case of *Brotherhood of Maintenance of Way Employees v. Page,* 123 S.W. (2d) 536, the cases discussed in Appellant's Brief (pp. 36-39), as illustrating a situation where suicide has been held adequately established as a matter of law, were all considered and commented upon by the trial Court in its opinion. The trial Court concluded however that "The cases cited by defendant all have one or more vital differences from the facts and circumstances here presented, such as location of the wound, kind of firearms used, and particularly statements indicating suicidal intent." The same comment is applicable to the *Brotherhood of Maintenance of*

Way Employees v. Page, supra, which involved a pistol shot through the head, where the insured had been out of work for more than a year because of continued sickness and on the day of his death was in the depths of utter despair on account of his physical and financial condition. None of the authorities relied upon by appellant are sufficiently close to the facts of this case to constitute authority for this Court to determine, contrary to the trial Court's findings, that the foregoing facts establish suicide as a matter of law.

C. The trial Court did not err in excluding certain evidence offered by appellant.

Appellant complains that the trial Court improperly excluded evidence offered by them on the question of motive. The excluded evidence consists of an insurance adjuster's report and a hypothetical question asked of one Dr. A. E. Bennett.

Over the objection of appellee, appellant read into the record the report of J. W. Van Doren, an insurance adjuster, dated October 22, 1953 (R. 237-246). Appellee thereupon made a motion to strike the report on the ground that it was incompetent, irrelevant, immaterial, that it is hearsay as to Mr. Houston and the plaintiff in the case and it was shown that Mr. Houston had not seen the report or had any conversation with anyone about it either before or after it was prepared (R. 247-248), which motion was granted by the Court. The report was apparently offered to show a possible motive for suicide, consist-

ing of remorse. It is insisted that the report itself is somehow indicative of Mr. Houston's state of mind.

The first difficulty with this argument is its remoteness in point of time. The incident involved occurred October 19, 1953. The report itself is dated October 22, 1953. It is uncontradicted in the record that the only aftermath of the incident was a letter received by Mr. Houston, dated November 9, 1953, which was turned over to his attorney, who dictated a reply on November 10, 1953 (R. 578-580) and that no other communication was received concerning it (R. 582). Obviously, the incident of October, having been laid to rest as far as Mr. Houston was concerned early in November, is not competent evidence of Mr. Houston's state of mind on, or even a reasonable time before, his death, February 22, 1954. Moreover, the inference that, as a result of the incident, Mr. Houston suffered a remorse sufficient to cause him to deliberately take his life almost immediately upon awakening on February 22, 1954 is under the circumstances of this case wholly unwarranted and without any support whatsoever.

Appellant erroneously asserts that an agency relationship existed between Mr. Houston and the author of the report. Mr. Youngers, upon whom appellant relies in this respect, testified explicitly that the morning after the accident Mr. Houston phoned him and asked him to take care of the question of the collision damage to his automobile and "to report the liability feature of the case to the London Guaranty Company" (R. 146). It should be noted the report itself

was addressed to this company (R. 237) which insured Mr. Houston's company for comprehensive liability coverage and from whose files the document in question was produced (R. 206). This evidence establishes that the adjuster was the agent of the liability carrier but is not proof of any agency relationship between Mr. Houston and the adjuster.[9]

Appellant also objects because the trial Court sustained appellee's objection to the hypothetical question posed to Dr. A. E. Bennett. Appellee's grounds for objection were that the question is "compound, unintelligible, assumes facts not in evidence, calls for the conclusion of this witness which is not subject to expert testimony, that there is no showing that this doctor ever examined Mr. Houston and upon the ground that it is not proper examination" (R. 297). The trial Court sustained the objection.[10]

The rejected hypothetical question (R. 295-6, App. Br. 24-26) obviously assumed facts not in evidence. Among these are reference to "several known press-

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[9]The case of *Guberman v. Weiner, Consolidated Hotels, Inc.,* 10 Cal. App. (2d) 401, cited by appellant (App. Br. 55) for the proposition that an adjuster's report is a declaration of an agent, admissible in evidence against the adjuster's principal, does not in fact support that contention. The case holds, as is set forth in headnote 3, that where the written report of the operator of a motor vehicle to the insurance carrier of his employer was made at his employer's direction, detailed facts of the accident and admitted that he was engaged upon business of his employer, such report, together with the facts stated therein was competent evidence, irrespective of any question of agency.

[10]Dr. Bennett was however permitted to testify generally concerning so-called cyclothymic personalities, "individuals who are subject to mood swings, either elation or depression, that go beyond normal" (R. 293) and that 15 to 20 per cent of such personalities end up as suicides (R. 304).

ing debts" "accustomed to having alcoholic drinks before lunch and dinner" "difference in demeanor described as a 'Jekyll and Hyde' transformation" "under influence of alcohol part of the time" "had periods of depression and recently had been depressed, shortly before his death." This in itself is enough to justify the objection. 58 *Am. Jur.* 483, Witnesses § 854; 19 *Cal. Jur.* (2d) 30, Evidence § 301. Moreover, the entire question cannot be said to represent fairly the evidence in the case. Even if the testimony of appellee's witnesses who knew insured well over periods of years were entirely disregarded, the statements of a waitress who supposedly saw him on three occasions and of a police officer who interrogated his widow immediately after the shooting, together with all the other innuendoes supplied by appellant, do not support the characterization of Mr. Houston as an abnormal, emotionally unbalanced person. The rejection of the question was therefore a wholly proper exercise of the trial Court's sound discretion.

19 *Cal. Jur.* (2d) 30, Evidence § 301;

Travelers Insurance Co. v. Drake, (1937, 9 Cir.) 89 F. 2d 47, 50.

See:

People v. Wilson, 25 Cal. (2d) 341, 348;

Bickford v. Lawson, 27 Cal. App. (2d) 416, 426.

Assuming without conceding that the trial Court erred, the exclusion is obviously not prejudicial. For an affirmative answer would have established nothing

more than Dr. Bennett's opinion that the fictional individual described is a suicidal type. This opinion, like any other expert opinion, would not have been binding on the trial Court.

19 *Cal. Jur.* (2d) 37, Evidence § 309.

Nor does the assertion that an individual is one of a group prone to suicide constitute competent evidence that a particular individual at a particular time did in fact intentionally destroy himself.

The whole line of Dr. Bennett's testimony is entirely irrelevant for the further reason that there is nothing to connect the generalized composite individual described by him as prone to suicide with the insured in this case. See *Estate of Gould,* 188 Cal. 353, 356. The witness never examined or tested, much less even saw the insured. Appellant cites *Smith v. Metropolitan Life Ins. Co.,* (Ill.) 47 N.E. (2d) 330, and *McClelland v. Great Southern Life Ins. Co.,* 220 S.W. (2d) 515, for the proposition that expert testimony of medical specialists is admissible to show that an insured possessed suicidal tendencies. In both those cases however the medical expert had examined or treated the insured prior to his death. In the *Smith* case, which appellant quotes extensively, the trial Court had permitted Dr. Brown to testify that he had examined the insured about a year before his death but on grounds of remoteness in time had sustained objections to the doctor testifying as to statements then made to him by insured. The Appellate Court, after concluding that a retrial was necessary because of an erroneous jury instruction, noted that

the migraine headaches of which insured had complained to Dr. Brown continued up to the time of his death and stated:

> "The purpose of the proffered evidence was to show by Smith's own statements, as related to Dr. Brown, that these frequently occurring headaches brought on depressive moods, irritability and restlessness, which he sought to alleviate by excessive drinking, and which affected him to such an extent that on two occasions he had contemplated suicide, and thereby lay the foundation for Dr. Brown's opinion that Smith's migraine was associated with depressive episodes, typical in phases of manic-depressive psychosis, having a tendency toward suicide by a patient so afflicted." (47 N.E. (2d) 330, 333).

Contrast the evidence upon which Dr. Brown was to base his expert opinion of Smith's possible suicidal tendency with the situation in the present case. Similarly, in the *McClelland* case, the evidence disclosed that the insured had been suffering from an emotional illness evidenced by fixed depression, was undergoing treatment for such illness and was to return for electro-shock treatments the day following his death.

Appellant also specifies as prejudicial error the trial Court's ruling excluding the portions of two police officers' reports which contained opinions and conclusions concerning the cause of insured's death. Prejudicial error is also claimed in the trial Court's ruling striking testimony of the coroner that prior to the inquest he had informed appellee's counsel that he (the coroner) had reached a conclusion as to the

cause of death and nothing he had heard at the inquest had changed that original impression (App. Br. 626-27). Appellant argues that the death certificate and verdict of the Coroner's Jury were irrelevant and immaterial and, these having been admitted in evidence, appellant had the right to explain the circumstances surrounding the making of the verdict and the right to rebut the opinions impliedly expressed in the verdict. If, in fact, the death certificate and verdict of the Coroner's Jury were irrelevant and immaterial, it is difficult to conceive how appellant could have been prejudiced by a refusal of the trial Court to permit rebuttal testimony; in fact, counsel for appellant admitted on the trial that he wouldn't be prejudiced by the admission of the verdict[11] (R. 334).

As conceded by appellant, the death certificate and verdict of the Coroner's Jury were, under the authorities, properly admissible, not as appellant contends for the purpose of supporting the testimony of appellee's experts, but as prima facie evidence of the facts therein stated. *Walther v. Mutual Life Ins. Co.,* 65 Cal. 417; *Ellenberger v. City of Oakland*, 76 Cal. (2d) 828, 835; *Bryson v. Manhart,* 11 Cal. App. (2d) 691 (cited by appellant). The fact thus established was that the Coroner's Jury could not determine whether the death was suicidal or accidental. The

[11] Although the death certificate and verdict of the Coroner's Jury were admitted subject to appellant's motion to strike (R. 336), it does not appear that appellant ever in fact made the motion, although at the time of briefing appellant did move to strike the testimony of Dr. Kirk and Mr. Bradford concerning their tests upon the gun in question.

testimony of police officers, who made the initial superficial investigation of the shooting, and of the coroner, whose knowledge of the circumstances was obviously limited to knowledge of the condition of the body of deceased, would not in any sense have detracted from the fact that the Coroner's Jury could not reach a determination. Therefore it would not constitute competent rebuttal evidence on the point for which appellant purported to offer it.

The plain fact is that appellant desired to show the opinion of the police officer[12] and coroner, based upon initial superficial investigation, that the death was suicidal. There could be no question that such conclusion by any witness, expert or non-expert is not admissible for the reason that it would constitute a transgression upon the function of the trier of fact to determine the issue of whether death was intentionally self-inflicted.

D. The facts and circumstances are consistent with the theory of accident and inconsistent with one of suicide.

The physical facts, together with all the surrounding circumstances, disclosed by the record, amply support the trial Court's finding that Mr. Houston's

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[12]Moreover, even if such testimony were admissible it should be noted that Inspector Parker testified that his assignment was the investigation of homicide and felony assaults (R. 617), from which it is obvious that his initial investigation as well as that of other police officers was for the purpose of determining whether there was any indication that a crime had been committed, i.e., whether Mr. Houston had been murdered, and the result of such investigation, even if otherwise admissible, would not constitute competent evidence on the issue before the Court of whether insured's death was intentionally self-inflicted.

death was accidental and not intentionally self-inflicted. Among the established facts and circumstances which support a theory of accident and are inconsistent with the suicide theory are the following:

The time and place of the shooting are consistent with a theory of accident and do not compel a conclusion of suicide. The brief time interval of ten or fifteen minutes which elapsed from insured's being awakened from a sound sleep to the time of the shot (R. 351), together with his known actions during that short period, make it highly improbable that a plan of deliberate self-destruction would or could have been conceived, formulated and carried into effect. There was simply not enough time for all that to have transpired. It is likewise inconceivable that with a pistol in his closet (R. 426) and shells available in his dresser drawer on the second floor (R. 409), he would have gone down to the basement to obtain a rifle where a shot ranging upward might have endangered members of his family. Appellant suggests that if insured had any reason other than suicide in going to the basement, he would have said something to his wife and daughter. With equal logic, it can be inferred that if he had in fact intended suicide on going to the basement, he would have made some excuse or pretext for going, so as to forestall any possible interruption. Appellant's assumption that insured's intention for going to the basement was suicide is entirely unwarranted, since he went there within approximately ten minutes of the time he was awakened and had arisen (R. 351), since according

to members of his family he frequently visited the basement dressed in his bathrobe and slippers and that it was not unusual for him to do so while awaiting the completion of the preparation of a meal (R. 372).

Appellant notes that the only shell in the gun was the one which was fired, from which it is assumed that the single shell had been inserted in the gun by insured immediately prior to the firing. Such assumption is entirely unwarranted in view of the uncontroverted testimony of several witnesses that insured habitually kept loaded guns around the house (R. 388, 432); that insured was without glasses which he normally wore (R. 357); that the paper bag where were located the only other shells which would fit the gun was found closed in place on a shelf (R. 121) and that only a minute or so elapsed between the time the insured went to the basement and the shot was fired (R. 423). In that brief space of time insured would obviously have been unable to locate the gun, open the paper bag and find the right size shells among a variety of shells, carefully close and replace the paper bag, load the gun and position himself to fire it as appellant assumes.

The position of the gun and body at the time the shot was fired and the consequent nature of the wound and path of the bullet are inconsistent with a suicidal theory. Appellant assumes that the gun was deliberately placed on the floor, pointed directly upward and that insured intentionally leaned over the muzzle before firing the shot. For one to assume such an un-

natural and uncomfortable position does not square with reality. The overall length of the gun was three feet (Defendant's Exs. B, D). It was obviously possible and considerably easier for insured to have held the gun in front of him and reached the trigger without the necessity of nearly bending double. This also would have avoided the possibility of a bullet harming any member of his family on the floor above. Appellant's theory that the gun was deliberately positioned as it was is also refuted by the fact of powder burns. If insured had leaned over the muzzle as supposed by appellant, it would have been pressing against his chest and according to the testimony of Mr. Bradford there would have been no powder burn (R. 533).

The factor which most eloquently supports a theory of accident is the fact that after the shot was fired, the insured, mortally wounded, struggled 15 or more feet from the narrow passageway in which the accident occurred toward the exit from the basement and help. As the trial Court observes, in none of the cases involving suicide by shooting did a person bent on self-destruction make any effort to change position after mortally wounding himself (R. 51).

A physical factor of importance (although the trial Court has stated that it would have reached the same decision without considering it (R. 52)) is the fact that the gun in question could be accidentally fired in any one of several ways. It was testified that with the shell in the firing chamber and the hammer closed the gun could be fired by a sharp blow at the extreme

butt of the gun (R. 515, 521, 529). This evidence is uncontroverted. Appellant produced no expert on guns who examined it or made any tests concerning its firing characteristics. As discussed, infra, the testimony of appellee's gun experts was competent and clearly admissible. Appellant contends that the fact that a butt impression of the butt of the gun was left on the basement floor establishes that the gun must have been positioned before firing rather than dropped. This conclusion does not necessarily follow, since it may have been possible for the gun to have been dropped with sufficient force to cause it to fire and not great enough to cause a mark in the floor. Or, if any such impression had been made by the dropping of the gun it would have been obliterated by the subsequent recoil mark. The fact that the gun could be accidentally fired distinguishes this case from many cited by appellant. It is a fact wholly inconsistent with a theory of suicide.

Thus, the so-called physical facts relied upon by appellant not only are not such as to eliminate all reasonable possibility of accident, but in fact they strongly indicate accident. There is nothing in those facts inconsistent with an accident. It is certainly not impossible, nor inherently improbable, that insured went into the far corner of the basement to obtain the gun which was standing in that corner with its butt on the floor and the barrel leaning against the wall; that he grasped it by the barrel and turned to come back to the open area of the basement; that in the congested area where his passageway was only

approximately a foot and a half wide he naturally held the gun before him so as to avoid hitting it on any of the objects with which the passageway was lined; that, being partially stooped because of the low ceiling, he stumbled and started to fall forward and involuntarily thrust the gun forward and downward to the floor in a vain effort to support himself; and that the bar on the butt as it hit the floor was sufficient to cause the hammer, which was in a closed position, to fire the shell, which had been left in the firing chamber, just as he pitched forward over the barrel. That he had forward momentum at the time of the firing, and was not standing stationary and flat-footed as presumed by appellant, is strongly indicated both by the fact that the gun itself fell forward in the direction he was moving and by the fact that, though mortally wounded, he was able to move forward fifteen or more feet from the spot of the shot to the place he was found.

There is nothing contrary to the laws of physics or unnatural in the foregoing thesis. It is uncontroverted that the gun could have been caused to fire accidentally in the manner suggested. The movements of insured in the few instants before, during and after the shot are exactly what could reasonably be expected of a big man in a congested and confined space. Even if his actions might seem foolish or careless by other men's standards, they were certainly not intentionally suicidal beyond question.

On the other hand, to sustain appellant's suicide theory would require the Court to assume that insured

deliberately placed himself in an unnatural and obviously awkward position; that, notwithstanding his knowledge of firearms, he selected a cumbersome rifle rather than a handy pistol, readily available; that he deliberately aimed at his chest with the possibility of merely maiming himself rather than the certain method of aiming through his mouth or at another portion of his head. (It should be noted that the bullet in fact missed his heart.) In short, the inferences and assumptions supporting an accident theory flow naturally and logically from the known facts and circumstances, while those necessary to sustain a suicide theory are inconsistent with and contrary to the evidence.

Thus, even if the case were viewed narrowly, disregarding all other facts and circumstances and looking only at the so-called physical facts as appellant would have this Court do, appellant's suicide theory is without rational support. This Court will, however, properly take into consideration *all* the surrounding facts and circumstances. These make crystal clear that the death of insured was an accident and not suicide.

It is uncontroverted that insured was in good health and was successful in business and had no financial worries or domestic difficulties; that he had made definite plans and commitments both for the immediate (R. 347, 543) and more distant future (R. 553). All of appellee's witnesses agreed that insured was one who loved life and had every reason to live. On the trial appellee did not stint in producing those

witnesses who knew insured most intimately in all the varied phases of his active life and particularly those who saw him during the last few days of his life, all in order to portray accurately for the Court the nature and character of the man. The cumulative effect of the testimony of those witnesses is simply that insured was not the kind of person to destroy himself without cause and that there was no cause. These witnesses were available to appellant for cross-examination, but nothing was developed to controvert their testimony in any material respect. In fact the testimony of appellant's own witness Masters corroborated that of the other witnesses who knew insured well (R. 196-197).

Appellant argues that it has been judicially held that facts of this sort are not inconsistent with suicide (App. Br. p. 41). The case of *Burkett v. New York Life Ins. Co.,* 56 Fed. (2d) 105, relied upon by appellant, was an action to recover under the double indemnity provision of an insurance policy. The fatal wound was through the roof of the mouth and into the brain. A physician who had examined insured testified that the insured was a neurotic. He had gone into a store, picked up a gun behind a counter, opened it disclosing that it was empty, then continued past boxes of shells out the rear door of the store, following which a shot was heard and his body was found about 3½ feet from the door. A gun expert testified that the gun would not be fired by being dropped, unless it fell directly on the hammer and that it would not be fired by hitting a hard surface

in falling. The Court held that the beneficiary in that case had failed to sustain her burden of proof that the death was accidental. This case, like others, which can be found where the trier of fact's determination of suicide has been upheld on appeal, is vastly different from the situation here presented.

The true rule applicable here is that set forth in *Beers v. California State Life Insurance Co.,* supra, that where there are circumstances tending to sustain a suicide theory and others tending to negative that theory, each of which may be viewed as substantially equal in probative force, it then becomes of exceptional importance for the trier of fact, and of even greater importance on appeal, that there was an entire absence of motive for insured's purposely or intentionally taking his life (87 Cal. App. 440, 463). The absence of a farewell note or letter or of any statement indicating suicidal intent at any time preceding the shooting, or of any reason for suicide, makes it clear that insured did not in fact intentionally position himself and deliberately pull the trigger as supposed by appellant. This is particularly true in light of the evidence of insured's character and circumstances which unerringly show a positive intention to continue to live.

E. Testimony of appellee's experts concerning the characteristics of the gun was admissible and in any event appellant was not prejudiced by the admission of such evidence.

Upon the trial, appellant's objection to the testimony of Dr. Kirk as to firing tests conducted with the gun which shot Mr. Houston was that it would

constitute evidence of tests which any one could perform, and that it would be speculation and conjecture to testify how a gun might be accidentally discharged, when there is no proof of accident (R. 507). Appellant relied at the trial and in its motion to strike and relies in its brief (App. Br. pp. 50-51) upon the case of *Long v. California Western States Life Ins. Co.,* 43 Cal. (2d) 871, as supporting its position. In that case, however, the gun expert had been asked to testify concerning tests he made as to a manner of tripping or falling to produce wounds such as were inflicted upon deceased, not tests as to the mechanical operation and firing characteristics of the gun in question as are here involved.

That an expert witness may testify to his opinion as to the mechanical operation of a gun and the method by which it may be fired is well established (19 *Cal. Jur.* (2d) 95, Evidence, § 367; *People v. Willis,* 70 Cal. App. 456, 472-3). It should be noted that appellee's two experts testified that the results of their tests and examination of the gun disclosed that the gun could be fired by means other than intentionally pulling the trigger, in other words that *it could be fired accidentally* (R. 512-3, R. 529). This was certainly well within the field of expert opinion. It was evidence of the mechanical characteristics of a particular gun—a matter upon which each expert was able to testify by reason of special training and experience with firearms. Neither expert was asked or purported to testify that the shot which actually killed Mr. Houston was in fact accidental; they ex-

pressed no opinion as to the cause of death, as in the case of *People v. Heacock,* 10 Cal. App. 455, cited by appellant. That case is not here in point.

Appellant's objection to the testimony of Dr. Kirk and Mr. Bradford was limited to the contention that it was not within the scope of expert testimony and was speculative (R. 507, 510, 511, 526). In its brief following trial appellant suggested that the evidence of firing tests was inadmissible for the reason that the shells used in those tests were not the same as the fatal cartridge, since those tested had had the projectile removed as a safety precaution. Mr. Bradford testified that the cartridges used for tests were obtained from the paper bag in the basement of the Houston residence and were the same as that which had killed Mr. Houston, except only that the projectile had been removed (R. 531-32). Appellant introduced no evidence that the removal of the projectile from the cartridge would alter the gun's firing characteristics. The trial Court concluded that such removal in no way affected the tests on the mechanical operation of the gun (R. 52). There is no question that the gun upon which the tests were conducted was the same gun which killed Mr. Houston (R. 525). Certainly there was a sufficiently substantial similarity between the fatal shell and the test shells used in the same gun to justify the admission of the tests (18 *Cal. Jur.* (2d) 678, Evidence, § 205). The admission of such evidence is a matter within the discretion of the trial Court. (See *Ortega v. Pacific Greyhound Lines,* 20 Cal. App. (2d) 596, 597-8; Anno.

8 A.L.R. 18, 24, 37-38; *Greene v. U. S.* (1927, 9 Cir.) 19 Fed. (2d) 850, 852.

In its brief, appellant for the first time raises the objection that there was a lack of proper foundation for evidence of tests on the gun, since there was no evidence that it remained in the same condition from the date of death, February 22, 1954, to the date of the tests, about March 15, 1954 (R. 496). This objection, if it has any validity at all, obviously comes too late to be considered when raised for the first time on appeal.

See: *Laursen v. Tidewater Associated Oil Co.,* 123 Cal. App. (2d) 813, 817, 818;
Johnson v. Reily, (D.C. Cir.) 160 Fed. (2d) 249, 250-251.

The suggestion is obviously without merit; it appears that the gun was in the custody of the police from the time of the shooting until the tests were conducted (R. 496).

In any event, the evidence concerning the tests was not prejudicial. This is most apparent from the trial Court's opinion in which it was stated that the trial Court would have reached exactly the same decision in the case, whether the evidence of the tests had been presented or not (R. 52). Moreover, appellant itself questioned Dr. Kirk about the results of the test (R. 519-520) and it is not now in a position to object that it was prejudiced. (See *People v. Dye,* 81 Cal. App. (2d) 592, 961-62; *People v. Dollor,* 89 Cal. 513, 517.)

II. THE TRIAL COURT'S FINDING THAT INSURED DID NOT FRAUDULENTLY MISREPRESENT HIS HABITS IN THE USE OF INTOXICATING LIQUOR IS SUPPORTED BY THE EVIDENCE.

A. Appellant had the burden of establishing the affirmative defense of fraudulent misrepresentation.

The normal rule requiring a defendant to prove an affirmative defense is specifically applied to defenses alleging material misrepresentation in applications for policies for life or accident insurance. In *Everett v. Standard Acc. Ins. Co.,* 45 Cal. App. 332, where the defense of misrepresentation in the application for an insurance policy was raised, the Court stated:

> "The special defenses raised by appellant were all based upon the alleged fraud of decedent. The presumption is always against fraud. This presumption approximates in strength that of innocence of crime (*Truett v. Onderdonk,* 120 Cal. 581, 588, (53 Pac. 26).) One who seeks relief from fraud must allege it and prove it by clear and satisfactory evidence. A mere suspicion of fraud is not sufficient. * * *"

To the same effect see *Scoles v. Universal Life Ins. Co.,* 42 Cal. 523, and *Mickschl v. The National Council of The Knights and Ladies of Security,* 40 Cal. App. 100.

B. The evidence establishes that insured did not misrepresent his drinking habits.

Representations concerning habits as to the use of alcohol necessarily refer to the time that the application is made and such reasonable time prior thereto as would allow one to form a habit. Similarly, such

representations do not refer to an occasional or exceptional use of alcoholic beverages but to the habitual and customary use. 26 A.L.R. 1279, 1281-82, 1284; 29 *Am. Jur.* 474, Insurance, § 584.

The case of *McEwen v. New York Life Ins. Co.,* 42 Cal. App. 133, involved questions and answers very similar to those in this case. The insurance company defended on the ground that the answers contained fraudulent misrepresentations. The jury, in addition to a general verdict in favor of plaintiff, rendered special verdicts finding that the answers to the questions were true and that the insured was not an habitual drinker. Upon appeal it was contended that the jury's special verdicts were contrary to the evidence. The Appellate Court held otherwise, stating:

> "* * * suffice it to say that as to 4a the question was not whether McEwen had used liquor at all, but assumed as a fact that he did use them. The inquiry is directed solely to the extent of his daily consumption of such beverages. Hence, conceding that, as shown by the evidence, he did at times, varying in intervals of two to four weeks, drink both beer and whisky, such fact is not inconsistent with his answer, 'No daily habit—occasional beer.' The response made cannot, as urged by appellant, be construed as a representation that he never drank whisky at all; but as we interpret the question and answer, it was simply a statement to the effect that he was not addicted to its daily use.
>
> "The reply to question 4b is that he never at any time had used such liquors to excess. No

court, so far as we are advised, has undertaken to define what constitutes the excessive use of alcoholic spirits. * * * The meaning of the word 'excess,' as here used, is largely a matter of opinion, depending upon the capacity of the individual and liberality of view entertained upon the subject by the individual, whose opinion might again be governed by the time, place, and occasion. (*Clinton v. State,* 64 Tex. Cr. 446, [142 S.W. 591]; *Biermann v. Guaranty Mut. Life Ins. Co.,* 142 Iowa, 341, [120 N.W. 963].) In the absence of any standard of measurement, the question is one of fact to be determined by the jurors, whose conclusion, as stated, would depend largely upon their views as to what constitutes excess in the use thereof. It cannot be determined upon the quantity used, because of the fact that an amount which might affect one individual would not be noticeable upon another. The most of the testimony bearing upon the question was given by witnesses from Daggett, near which place it appears deceased was engaged in the operation of a mine and from which he, from two to four weeks, went to Daggett, at which times he concededly drank more or less whisky and beer. There is little testimony touching the quantity of his libations. Apparently he did not drink sufficiently to interfere with his transaction of business, and it fairly appears that there was a conflict of evidence as to the effect upon him of that which he did drink. Under the circumstances shown, we cannot say that the jury, upon the testimony as to his habits of drinking at Daggett, were not justified in their verdict that he did not drink to excess."

See also *Mayfield v. Fidelity & Casualty Co.,* 16 Cal. App. (2d) 611.

The assertion in Appellant's Brief that the evidence is undisputable that Mr. Houston habitually used alcoholic stimulants and at times used them to excess is wholly unsupported by the record. The testimony of appellant's witnesses on the subject of Mr. Houston's drinking habits is set forth in the statement of the case (supra, p. 8). As previously noted, the transcript of the testimony of appellee's witnesses on this subject is set forth in Appendix B. It is apparent that, even viewed most favorably to appellant, the evidence presents a mere conflict and that the overwhelming weight of the evidence is clearly that Mr. Houston was not an habitual drunkard, that his use of intoxicants was not immoderate or excessive and that his use of them was social and occasional and not habitual. It should be noted again that the testimony most strongly relied upon by appellant concerns the alleged intoxication of Mr. Houston on an occasion occurring a month after the application was signed by him.[13] The trial Court's conclusion in its opinion that the insured's use of alcohol was not proven to be excessive or unusual so that it could be said that he misrepresented the facts in answering the questions propounded to him in the application is clearly supported by all the evidence in the case; its

[13]It should also be noted that the insurance application was taken and signed by Robert Utley (R. 375-376), an agent of appellant who knew insured well and who certainly had ample opportunity to be informed concerning Mr. Houston's drinking habits in Lakeview, Oregon.

formal findings that the answers do not constitute a material misrepresentation or any misrepresentation with respect to insured's use of alcoholic stimulants is obviously correct.

C. The trial Court did not err in excluding testimony of appellant's assistant secretary concerning appellant's underwriting practices respecting drinking habits.

Appellant sought to have its assistant secretary and claims officer testify to the effect that under appellant's practice at the time the policy was issued it would not have issued a policy in the case of an unfavorable personal history of drinking habits (R. 329). Appellant argues that the matter of drinking habits of a prospective insured is a material consideration affecting the question of whether an insurance company will assume the risk of insuring a particular life.

In view of the trial Court's finding that there was no misrepresentation by Mr. Houston concerning his drinking habits, the question of the company's underwriting practices with respect to unfavorable personal history of drinking habits is completely irrelevant. Appellee does not deny that generally a misrepresentation with respect to drinking habits may well be material, but in this case no misrepresentation was established.

The other question asked appellant's assistant secretary as to whether the company would have issued the policy had it known Mr. Houston's history of drinking habits was obviously improper not only because it erroneously assumed that misrepresentation

in this respect had been established but because it calls for a speculation, conclusion and opinion of the witness. Certainly the testimony of an officer of appellant as to what appellant would or would not have done under a state of facts not shown to exist is wholly improper.

III. THE TRIAL COURT CORRECTLY AWARDED INTEREST FROM MAY 4, 1954, THE DATE PROOF OF LOSS WAS RECEIVED BY APPELLANT.

Appellee was entitled to interest upon the amount found due from the date proofs of loss were submitted to the date of judgment. The policy sued upon provides:

> "CLAIM. The amount due on the assured's death shall be payable on receipt by the Company at its Head Office of due proof of such death * * *"

The family income provision provides for payment of a guaranteed income of $200.00 per month, "the first payment to be due as of the date of assured's death and subsequent payments to be due on the same day of each month thereafter during the remainder of the family income period, * * *".[14] Under these provisions there can be no question but that appellee was entitled to payment upon the date of receipt of proof of death at the company's head office. It was

[14]The parties have stipulated, subject to the approval of this Court, that reference may be had to provisions of the insurance policy sued upon without printing the entire policy in the record (R. 699-700).

stipulated on the trial and the trial Court found that the "proof of loss and claim was dated April 16, 1954 and was filed with and received by said defendant Canada Life Assurance Company on said 4th day of May, 1954 and that said proof of loss and claim was in proper form, as required by said defendant in said Policy No. 1,003,546 and amendments thereto, and that said defendant raised no question as to the proof of loss from a technical standpoint and the only defenses urged in said action and at the time of trial were the affirmative defenses of said defendant, namely, the defense that the insured had committed suicide and had made misrepresentations as to the extent of his drinking in his application for insurance." (R. 73.) Appellee was therefore entitled to payment on May 4, 1954 under the terms of the policy.

Appellee's right to payment having accrued on May 4, 1954 it follows as a matter of statutory law that she is also entitled to interest from that date. California Civil Code, Sec. 3287, provides:

> "Every person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him upon a particular day, is entitled also to recover interest thereon from that day, except during such time as the debtor is prevented by law, or by the act of the creditor, from paying the debt."

See: *Happoldt v. Guardian Life Ins. Co.,* 90 Cal. App. (2d) 386, 404;

Engelberg v. Sebastiani, 207 Cal. 727, 729-730.

California Civil Code, Sec. 1449, relating to a right of selection between alternative acts, has no bearing upon this situation. Obviously, if appellant had been making regular monthly payments since the date of death, as required by the policy, appellee could not have claimed for the commuted value computed as of the date of death, but appellee has received absolutely nothing under the policy. Moreover, in addition to stipulating that the proof of loss was filed and that there was no technical objection to it, counsel agreed that the commuted value of the policy and the amount properly involved in the action was $28,552.00 (R. 94-95). Unless either of the appellant's two affirmative defenses were established, this amount was unquestionably due appellee on May 4, 1954. Under these circumstances, it is apparent that the trial Court correctly allowed interest at the legal rate provided by California statute from the date such amount was due to the date of judgment.

For the reasons hereinbefore stated, it is respectfully submitted that the judgment should be affirmed.

Dated, San Francisco, California,
September 7, 1956.

Respectfully submitted,
PHILIP H. ANGELL,
ROBERT M. ADAMS, JR.,
By ROBERT M. ADAMS, JR.,
Attorneys for Appellee.

(Appendices A and B Follow.)

Appendices A and B.

Appendix A

Charlotte H. Clayton (wife) (R. 381-382, 386, 407-8).

Q. I am not sure that I have asked you this question and you answered it, so I am going to state it again—ask the question again: Will you state, as nearly as you can to—tell us what was Mr. Houston's nature. Was he ordinarily a happy sort of person or a gloomy, melancholy person?

A. He was a happy person.

Q. Would you characterize Mr. Houston as an extrovert?

A. I would.

Q. Vigorous?

A. Very, very.

Q. Dynamic?

A. I would.

Q. And did Mr. Houston, as far as you observed, always enjoy the things that he was doing?

A. He loved life, he really did.

* * * * * * *

Q. Now referring, first, to your entire life with Mr. Houston as a wife, did you ever at any time during your entire life as a wife of Mr. Houston ever hear him state that he intended to or would take his life by his own hand?

A. Never.

Q. Now, that period just before Mr. Houston's death on February 22, 1954, did Mr. Houston make any statement to you of any kind, that he intended to take his life?

A. Absolutely not.

Q. Did he state anything to you as any reason which might cause him to take his life?

A. No, sir.

* * * * * * *

Q. And did you tell them that this approximate period of the year he had periodic periods of depression?

A. I said, "depression", possibly. I don't know what I said at that point. But I didn't mean by "depression" what your Dr. Bennett meant yesterday, I assure you.

Mr. Clausen. I ask the last portion go out as a voluntary statement, Your Honor.

The Court. It may go out.

Mr. Clausen. Q. Did you tell them at that time that your husband had been, during these periods, nervous?

A. I think I—I don't know, as I said, I was—you can imagine how I felt—I can't say I said this and I didn't say that. I can only say that I did not mean by "depression" what you felt I meant.

Mr. Clausen. Again ask that go out.

A. I meant preoccupied.

Mr. Clausen. Again, Your Honor, we ask the last portion go out as to what she meant.

The Court. The question and answer will stand.

Ann Houston Hanscom (daughter) (R. 427).

Q. Had you ever at any time in your life heard your father make any statement that he intended or was going to commit suicide?

A. Never.

Q. Did you observe your father's demeanor that weekend when you were home, as to whether he seemed to be his natural self, or did you see anything different about him than the usual way he looked or talked?

A. No, I didn't.

Q. Did he appear to be happy and about the same as he always was, at that time?

A. Yes.

Q. There was nothing that led you to be suspicious?

A. No.

Leroy Hanscom (patent attorney, friend for eight or nine years, father of Ann Houston's fiancé) (R. 457-458).

Q. Will you describe Mr. Houston's disposition, to the court, just as you observed him, as to what kind of a man he was?

A. Well, Mr. Houston was a very vigorous sort of man, a very genial—for example, when he greeted you you had no misgivings that you had been properly greeted. I don't think as far as I know, there was ever any fluctuation—he always seemed to be of an even temperament and always very jovial and congenial.

Q. Was he a nervous type of individual?

A. I wouldn't consider him so, no.

Q. You say he was a happy personality?

A. Decidedly so.

Q. Enjoyed talking politics?

A. He enjoyed doing anything. He enjoyed living.

Q. Sports?

A. Particularly sports.

Q. Active in his church?

A. Yes, he was.

Q. You observed Mr. Houston in his home life?

A. Certainly.

Q. Did you ever observe any discordant note in the family?

A. On the contrary, he was always—had a very affectionate nature toward both his wife and two daughters.

Q. All the years you knew Mr. Houston did you ever hear him make any statement whatsoever that he was going to take his own life or that he would commit suicide?

A. Never.

Donald C. Campbell (hunting companion for seven years) (R. 468).

Q. Now, on these various trips that you would take, in all the time that you were with Mr. Houston, did you have an opportunity, and did you, Mr. Campbell, observe Mr. Houston's nature, his actions?

A. By all means, I certainly did.

Q. Now, would you say that Mr. Houston was ordinarily a happy man who enjoyed life?

A. He enjoyed it more than anybody I have ever met before or since.

Q. Did you ever hear Mr. Houston at any time or any place mention anything about taking his own life?

A. Why, absolutely not.

Ellen May Hoffman (confidential secretary for ten years) (R. 542).

Q. How would you describe Mr. Houston in his attitude and disposition around the office, just generally, Miss Hoffman?

A. Well, he was a very energetic man. He had a job to do and he felt that he must do it, and he did it very well; and he was very considerate of other people and I would say that he was a man with a heart.

Q. Would you describe him as a nervous person, or a man who took his work more or less in stride without too much worry or show?

A. No; he did things as he came to them and he didn't worry about them before he came to them at all. I mean he took one job and did his work in stride.

Bert W. Levit (attorney at law, who had handled legal matters for Mr. Houston's company) (R. 545-547).

Q. Will you in your own words state for the court and the record what you observed as to Mr. Houston's demeanor and attitude as you saw him through those years, as to whether he was a happy person or an unhappy person?

Mr. Clausen. Your Honor, my objection to this same kind of testimony has been made before. I won't remake it if it is understood it runs to this line.

The Court. Well, I allowed both sides considerable latitude in that respect to accommodate the case.

Mr. Clausen. All right, Your Honor. May it be understood my objection runs to this line?

The Court. Let the record so show.

A. Well, I would say that as between the two classifications of being a happy or an unhappy person, he always impressed me as being a happy person.

Mr. Angell. Q. Did you ever see Mr. Houston when you would call him depressed, melancholy or in a bad mental state?

A. No, sir, I never did.

Q. And would you describe Mr. Houston as an extrovert or an introvert?

A. Well, I wouldn't say that he was an extremist on either side. I didn't consider—there is nothing that I could put my finger on to say that I would consider him either one or the other.

Q. But when he was with the insurance group in these insurance company activities, did he seem to enjoy taking part in them?

A. Oh, very definitely. He participated in the normal business gatherings and in the normal social gatherings at these meetings, and so far as I was able to observe, no differently from anyone else.

Q. Did you ever hear Mr. Houston——

A. He was friendly, I would say that. He was certainly a very friendly person to those with whom he came in contact.

Q. Did you ever hear Mr. Houston express any desire or intent to commit suicide?

A. Never.

Harry A. Utley (close friend, hunting companion, business associate, known well for ten years) (R. 564).

Q. You had great opportunity to observe Mr. Houston, did you not, as to whether he was a happy person or an unhappy person?

A. Oh, yes.

Q. Would you describe for the court just how you could classify Mr. Houston with respect to whether he was depressed or morbid or a person worrying?

A. Well, he was always a very cheery person. He always had something doing. He was always active and he always had some plans on going sage hen hunting or duck hunting or deer hunting. He was a very cheery and thorough businessman.

Q. And did you ever see anything in the nature of a Dr. Jekyll and Mr. Hyde in Mr. Houston, would you say?

A. No, no.

Evans M. Taylor (attorney at law, legal advisor, business associate and social friend, known ten or twelve years) (R. 570-571).

Q. And did you have, would you say, a fair opportunity to observe Mr. Houston as to his nature and conduct, as to whether you would say he was a depressed man or a morbid man or a morose and melancholy man?

A. I did have a number of occasions to observe him, yes.

Q. And would you just state in your own language a word picture of how you would describe the characteristics of Mr. Houston with respect to his emotional moods?

A. Well, I would say he was essentially a very friendly person, a person who not only seemed to enjoy things and events but thoroughly enjoyed people, and an active person.

Q. Would you call him a depressed person?

A. Not in any sense.

Q. Did you ever see him depressed?

A. No, I wouldn't say that I ever saw him depressed.

Q. Did you ever see him morbid?

A. No.

Q. Did you ever hear him say he would take his own life or commit suicide?

A. No, sir, I never have.

Q. Did he ever express in any way a desire to remove himself from his environment?

A. No indication of that character in any respect.

Q. Did you observe him to be happy in his business life?

A. He seemed to be a thoroughly happy soul.

Q. And his wife and family?

A. Oh, yes.

Gilbert Wilkes (business associate, fellow Kiwanis Club member, known nine years) (R. 598).

Q. Did you ever hear him express his desire to get out of this life or out of his businesses?

A. I wouldn't think so, not with his personality.

Q. Did you ever hear him say that he might commit suicide or——

A. No, sir.

Q. ——or comment that people had a right to commit suicide?

A. No, sir.

Appendix B

Testimony of Charlotte H. Clayton (R. 385-386).

Q. Now, Mrs. Clayton, referring to Mr. Houston's use and consumption of alcoholic beverages. Did Mr. Houston take a drink?

A. Yes, he did.

Q. Did you observe his drinking in your home or when you were out with him?

A. I did.

Q. Would you just tell the court, in your own language, just what you observed with regard to Mr. Houston's drinking, and keeping it entirely within your own knowledge when he was with you?

A. Mr. Houston and I sometimes had a drink before dinner, sometimes sherry or beer, maybe a highball. Often when we went out where we were entertained we didn't drink at all. We very seldom went to cocktail parties. I never in my life saw my husband intoxicated, unable to drive, unable to talk or to conduct himself as a gentleman—not once.

Q. How long were you married to Mr. Houston?

A. I was married to Mr. Houston twenty-five and a half years.

Q. At any time in those twenty-five and a half years did you ever have occasion to criticize or complain to Mr. Houston of his conduct, within the home or elsewhere, because of his drinking?

A. No, sir.

Q. And did you ever see Mr. Houston ever drink by himself?

A. Never.

Testimony of Ann Houston Hanscom (R. 428-429).

Q. Now referring to your father's use of alcoholic beverages. Had you ever seen your father take a drink?

A. Yes.

Q. Will you just state in your own words to the Court about how you would describe your father's drinking, from time to time, say——

Mr. Clausen. Your Honor, we object to that as asking this witness to speculate. In other words, he is asking the witness to put an interpretation upon a habit, which is purely a conclusion or opinion of this witness.

Mr. Angell. I ask her to state what she saw.

Mr. Clausen. You asked her—

The Court. She may state what she saw, if anything.

A. He would take one or two or sometimes no drinks at all.

Mr. Angell. Q. And was there any time that you can recall when your father was not drinking anything?

A. Yes.

Q. When was that period, do you know?

A. I would say a year before his death.

Q. Did he ever tell you why he wasn't at that time?

A. He was on a fat-free diet, I believe.

Q. Trying to take off weight?

A. Yes.

Q. Did you ever, in all the years you lived with your father, all the trips you took with him, ever see your father intoxicated?

A. Never in my life.

Q. Did you ever see your father drink so much alcohol or where he had had so much alcohol that he was unable to drive his automobile?

A. Never.

Q. Or staggered?

A. Never.

Q. Or walked with uncertainty?

A. Never.

Q. Did you ever see your father when he had so much alcohol that he was not coherent in his speech?

A. No.

Q. And wholly rational in his speech? Did you ever see him in that condition?

A. No.

Testimony of Charlotte H. Gustafson (R. 450-451).

Q. Did you see how much your father drank at different times when you were out and around the home when he was present?

A. Yes.

Q. And will you just state in your own words what you observed of your father drinking and at such times as you observed it over the years as you knew him and when you saw him up until the time of his death?

A. Well, when he would come with my mother for dinner at my house we wouldn't have anything

to drink, and when we would go up to their house for dinner sometimes we would have something to drink, sherry or beer or a highball before dinner, sometimes nothing. I can positively say that I never saw him intoxicated in my life, ever.

Q. Did you ever see your father in a condition from drinking alcohol where he would be high or couldn't walk straight?

A. Never.

Q. Or couldn't talk coherently?

A. Never.

Q. Or what you would call drunk?

A. Never.

Q. Or intoxicated?

A. Never, no.

Q. Did you ever hear your mother, your sister, yourself—did you ever have reason to complain to your father about his drinking?

A. No.

Testimony of Leroy Hanscom (R. 456-457).

Q. Now, over the years that you have known Mr. Houston, from time to time have you been places where Mr. Houston was drinking?

A. In my home and in his home.

Q. Will you just tell the court in your own words about the extent of drinking, on those occasions when you were present and you saw?

A. Well, in my home it was the usual practice to ask a guest if they wanted a cocktail, a drink of any kind, and we would have one round, and if any

of them wanted to they would feel free to take it. That would be about the extent of it there.

In the Houston home about the same thing occurred. I know they oftentimes preferred beer to whisky. As a matter of fact, I distinctly recall that we celebrated the two preceding New Year's with them and when the whistles blew at midnight, why, it was a can of beer that we celebrated with.

Q. Have you at any time ever seen Mr. Houston intoxicated?

A. I have never seen him intoxicated.

Q. Have you ever at any time in your long acquaintance with him ever seen Mr. Houston under the influence of alcohol to the point where he was not coherent and entirely clear in his speech?

A. I have never seen him where—even when he has had a drink or two—that it seemed to make a particle of difference to him.

Testimony of Donald C. Campbell (R. 468-469).

Q. You saw Mr. Houston's drinking habits, did you not?

A. Yes, I certainly did.

Q. And will you just tell the court in your own words what you saw as to Mr. Houston's drinking habits and on these various trips and hunting, when you were with him socially, just what you observed.

A. Well, he would have a drink with everybody else and along with everybody else, but by no means, he was not an alcoholic by any way that you could picture him. He was—he just was a social—would drink right along with the crowd and very—

and up to a certain point, and he would cut off. He had a big responsibility and we were with businessmen under him on practically on all trips and he couldn't afford to——

Mr. Clausen. Your Honor, we will ask the last part go out.

Mr. Angell. We have no objection to it going out.

The Court. What he could afford to or not to do may go out.

Mr. Angell. Q. Did you ever see Mr. Houston on any of these trips under the influence of liquor?

A. By no means.

Q. And did you ever see him when he was unsteady on his feet or incoherent in his speech?

A. Why, certainly not.

Q. Did you ever see him when he couldn't drive his car with safety?

A. Why, I wouldn't go out with him if I thought that it was unsafe.

Testimony of Bert W. Levit (R. 547).

Q. And did you observe Mr. Houston's drinking habits at the time he was with you and that you saw him?

A. Well, I can't—I can't say specifically that I remember ever seeing him take a particular drink. I certainly would have observed it had he not taken a drink when other people were drinking, because I have seen him at these meetings when people were having a few drinks and I observed no difference between Mr. Houston's habits in that regard and the others. And I observed that these people were

all quite sober people. In other words, I never saw Mr. Houston at any time under the influence of liquor in any degree.

Testimony of Ellen May Hoffman (R. 552-553).

Q. You had a chance to observe Mr. Houston's drinking habits?

A. Yes.

Q. Where would you be on occasions?

A. Oh, well, there were various social occasions, such as Christmas parties or maybe company banquets, something like that.

Q. And at such times as you ever saw Mr. Houston drink, would you state in your own words how many would you say he took?

A. Oh, he might have one or two drinks, maybe three.

Q. Did you ever see him intoxicated?

A. No, I have never seen him intoxicated and never seen him to the point he couldn't handle himself.

Q. Did you ever see him when he couldn't walk straight or talk straight?

A. No, I never did see him falter in his walk or hear him falter in his speech.

Testimony of Harry A. Utley (R. 566-567).

Q. And all the years that you knew Mr. Houston had you ever seen him drunk?

A. No.

Q. Did you ever see him under the influence of liquor to the point where he staggered or was incoherent?

A. No. We had social drinks together but he always could handle himself with wonderful shape. I never saw him where he couldn't.

Testimony of Evans M. Taylor (R. 573).

Q. And before we go into the events that occurred there, I would like you to state in your own language, if you can, the drinking habits of Mr. Houston as you observed them over the last four or five years before his death?

A. I would say that his habits were habits of social drinking. I have never seen him intoxicated and I have never seen him in a position where he did not appear to have all his faculties.

Q. And you went to many, many cocktail parties, did you not, and at these meetings with these insurance people?

A. Quite a few.

Q. Did you ever see him intoxicated at any of those?

A. No.

Q. Did you ever see him when he didn't have full control of his mental capacities or ever talked incoherently?

A. No, sir.

Q. Or did you ever see him where he couldn't drive his car?

A. I have not.

Testimony of Roger Gustafson (R. 590-591).

Q. During the years that you knew Mr. Houston from 1947 up to the date of his death on February 22, 1954, had you ever been on social affairs or in the home when Mr. Houston was taking any alcoholic drinks?

A. Yes, sir.

Q. And did you observe his drinking?

A. Yes.

Q. And could you very briefly and quickly summarize how you would describe the drinking of Mr. Houston and the number of drinks?

A. Well, at times—there would be times when he wouldn't take any at all; for instance, when he would come to my house for dinner, we wouldn't have any because I couldn't afford it; so at those times he wouldn't have any at all. Other times I would see him take I will say no more than three.

Q. Have you ever, in the years you have known Mr. Houston and been in his home and attended social functions, ever seen Mr. Houston drunk?

A. No, sir, I have not.

Q. Have you ever seen him with so many drinks aboard that he was incoherent or was not able to walk straight?

A. Definitely not.

Q. Have you ever been with him when he had drunk so much alcoholic beverage he could not talk coherently?

A. No, sir, never.

Q. Or show any signs of the influence of alcohol?

A. Never.
Q. Or drive?
A. Never.

Testimony of Gilbert Wilkes (R. 598).

Q. Now, before we get into that meeting, were you at a number of social affairs at which Mr. Houston was present, through the years of your association with him?

A. Oh, I had been to quite a few with Mr. Houston.

Q. On those occasions did you observe Mr. Houston's drinking habits?

A. He was always reasonable, conservative. As far as to my recollection, Mr. Houston could handle his liquor, as far as whatever he drank. He was never obstreperous; he was always courteous, and he knew what he was doing at all times.

Q. Did you ever see him drunk?

A. Well, certainly not.

Q. Did you ever see him—what you would say was under the influence of alcohol?

A. No, sir. Mr. Houston was normally a very happy person and very cheerful. People liked to be around him.